IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

OLIVER HILSENRATH,

Defendant.
/

No. CR 03-00213 WHA

ORDER DENYING DEFENDANT'S MOTIONS TO DISMISS AND MOTION TO RECONSIDER ORDER ALLOWING FOREIGN DEPOSITIONS

Defendant Oliver Hilsenrath, who has terminated his prior counsel and is representing himself, has filed two motions to dismiss various counts of the indictment, as well as a motion for reconsideration. For the reasons stated below, his motions are **DENIED.**[*]

Defendant first moves to dismiss Counts 7 and 8 of the indictment. Counts 7 and 8 allege violations of the wire fraud statute, 18 U.S.C. 1343 and 1346. Defendant's challenge to the indictment is entirely based on his own view of the facts. He contends that the embezzlement alleged in those counts was only a "differed salary [*sic*]," and thus that the facts do not support the allegations in the indictment.

It is well-established that a "district court cannot grant a motion to dismiss an indictment if the motion is substantially founded upon and intertwined with evidence concerning the alleged offense." *United States v. Lunstedt*, 997 F.2d 665, 667 (9th Cir. 1993) (internal

[*] At a hearing on October 24, 2006, the Court offered to appoint Mr. Doron Weinberg as counsel under the Criminal Justice Act. By letter dated October 24, defendant declined the Court's offer. That letter is on file as Doc. No. 284. At the hearing on the instant motions, the Court reiterated that it remained willing to appoint Mr. Weinberg as CJA counsel.

quotations omitted). Federal Rule of Criminal Procedure 7(c)(1) requires only that an indictment be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Defendant has made no showing that the Rule 7(c)(1) standard is not satisfied here. Accordingly, because defendant's motion is grounded on a factual determination, the motion lacks merit. Of course, if the government's case *at trial* is unsupported by any evidence, then the counts will be dismissed.

* * *

In a second motion, defendant moves to dismiss Counts 1 through 3 and 9 through 14. The crux of defendant's claim is that because his co-defendant David Klarman pled guilty and paid restitution, defendant is either exonerated of the claims or has already been found guilty so that double jeopardy bars his prosecution.

Prosecution of defendant is not barred on double jeopardy grounds. Double jeopardy only protects a defendant "against the imposition of multiple criminal punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99 (1997). Under the terms of Klarman's plea agreement, Klarman was required to pay restitution. Klarman's funds were put into an escrow account with the Clerk's office. By order dated August 28, 2006, this Court ordered those funds to be released as restitution. Klarman's guilty plea and restitution payment were not a criminal punishment against defendant Hilsenrath. Double jeopardy does not bar this action.

Defendant contends that under *Fant v. State*, 881 S.W.2d 830, 834 (Tex. Ct. App. 1994), a civil forfeiture of money gives rise to jeopardy, thereby barring a subsequent criminal prosecution. *Fant*, however, was reversed by an *en banc* panel of the Texas Court of Criminal Appeals for that very proposition. *See Fant v. State*, 931 S.W.2d 299, 307 (Tex. Crim. App. 1996). The *en banc* court held that "*in rem* civil forfeitures . . . are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause of the Fifth Amendment." This order notes that the Court of Criminal Appeals decision relied on and comports with the United States Supreme Court's "traditional understanding that civil forfeiture does not constitute punishment for the purpose of the double jeopardy clause." *United States v. Ursery*, 518 U.S. 267, 287 (1996). Notwithstanding the obvious fact that Klarman's restitution payments were made by

Klarman on his own behalf, defendant's reliance on an overruled intermediate Texas appellate decision is most disappointing.

Nor does Klarman's restitution payment exonerate defendant from liability as to the above-named counts. The counts at which defendant's motion is directed assert various bases for defendant's criminal liability. Defendant's alleged liability in a conspiracy or tax-fraud scheme does not evaporate simply because a co-defendant has pled guilty. Defendant's remaining contentions in this motion also lack merit.

* * *

In a third motion, defendant asks this Court to reconsider its order dated August 21, 2006, which permitted the government to take foreign depositions in Switzerland. Defendant's principal contention is that the depositions will, at best, reveal evidence that will be excludable at trial under Federal Rules of Evidence 403 and 404(b). This is not a valid reason to prohibit the depositions preemptively. The government is entitled to at least try to develop usable and admissible evidence at the depositions, subject to motions to exclude after the actual testimony is known. Defendant's remaining contentions in this motion also lack merit.

* * *

For the foregoing reasons, defendant's "Motion to Dismiss Counts 7 and 8 Based on Fed. R. Crim. P. 7(C)(1) and 12(b)(3)(B) and the 6th Amendment of the United States Constitution is **DENIED**. Additionally, defendant's "Motion to Correct the Sentence, Reconsider Order, and Dismiss Counts 1 to 3, and 9 to 14 on the Basis fo Double Jeopardy and the 5th Amendment of the United States Constitution" is **DENIED**. Finally, defendant's "Motion to Reconsider Order to Take Foreign Depositions in Switzerland Pursuing to Fed. R. Crim. P. 15" is **DENIED**.

Defendant's informal request to seal documents (Docket No. 286) is **DENIED**, as he has not articulated a reason why they should be sealed under Civil Local Rule 79-5.

IT IS SO ORDERED.

Dated: November 8, 2006

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE